IN THE

# Supreme Court of the United States

October Term, 1968

No. [redacted]61

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*vs.*

JOSEPH T. STRONG, d/b/a STRONG ROOFING & INSULATING CO.,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION

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## BRIEF FOR RESPONDENT IN OPPOSITION

## OPINIONS BELOW

The opinion of the Court of Appeals (Petn. pp. 13-21)[1] is reported at 386 F.2d 929. The decision and order of the National Labor Relations Board (Petn. pp. 27-42) are reported at 152 N.L.R.B. 9.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED

Where the National Labor Relations Board has found that an employer committed an unfair labor practice by

[1] "Petn." refers to the Petition for Certiorari herein; other references herein are as set forth in Petn. p. 3 n. 2.

refusing to execute a collective bargaining agreement negotiated on his behalf by a multi-employer group, and has ordered the employer to execute and honor the agreement, thus binding him to its terms, is not its additional requirement that the employer perform the agreement by paying certain fringe benefits provided therein beyond its jurisdiction, and an infringement of the exclusive contract-enforcement power of the courts?

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth in the Petition at pp. 43-44.

## ADDITIONAL STATEMENT

Petitioner's statement (Petn. p. 2 *et seq.*) is generally accurate but requires some amplification and emendation.

Respondent Strong operates a small individual business as a roofing contractor, strictly limited as to locale and character (Tr. 58-59). His annual purchases of supplies and materials did not exceed $50,000; he had but a handful of employees, most part-time; his wife performed the necessary functions of office manager and the handling of administrative details (Petn. pp. 28, 35; R. 15-16; Tr. 84, 88, 90; G.C. Exh. 5(a) and (b), Tr. 39).

Respondent's purported termination of the collective bargaining agreement as to him by his letter of August 20, 1963, was in the honest belief that he had the right to do so in accordance with his (erroneous) interpretation of Article X of the agreement, and the Board so found (Petn. pp. 33-34; R. Exh. 3, Tr. 66; R. 15; Tr. 66,

67, 68, 70).[2] Nothing at all occurred from that time to disabuse him of that belief until the charge herein was filed on June 3, 1964, almost ten months later. To the contrary, his bond deposit required under the contract was returned to him (Petn. p. 34; R. 16; Tr. 23, 70). His application to change his membership in the Association from "regular" to "associate" was approved, retroactive to October 1, 1963, and credit given him for the difference in dues (Petn. p. 34; R. 16; G.C. Exh. 3, Tr. 15; R. Exh. 1, Tr. 25; Tr. 14-15, 30).[3] Strong's payments of fringe benefits for September and October 1963 was in accordance with his belief that he could terminate but only on 60 days' notice (Petn. p. 34; Tr. 68-70, 77). In none of the three subsequent contracts which the Union had with Mr. or Mrs. Strong was there any indication that the Union considered Strong legally bound to execute or honor the agreement (R. 16; Tr. 52, 72-73, 91, 93) and the only fair inference from the testimony is that Strong believed the Union's request that he sign was in effect a request to him to return to a union-shop basis which he honestly thought he had legally and effectively terminated.

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[2] Respondent had previously (January 20, 1962) mailed a somewhat similar termination notice under an analogous provision of the 1960-1963 collective bargaining agreement under the same misapprehension as to its interpretation (Petn. p. 32; R. Exh. 2; Tr. 65; T.X. Exh. 1, Tr. 71; Tr. 63, 68-70, 79). However, not receiving any response, he continued to comply with that contract (Tr. 65-66).

[3] As set forth in the Petition, associate members are not represented for bargaining purposes by the Association and are not covered by the collective bargaining agreement (Petn. p. 4, n. 6; Tr. 25).

There was no charge or evidence of any antiunion bias or animus on Strong's part. On the contrary, relations were particularly cordial (R. 16; Tr. 91, 92-93). Strong, as a small operator in competition with other nonunion shops, was in an economic bind and took what he believed to be the proper legal steps to get out of it (R. 16; Tr. 52, 73). He was wrong in his interpretation but his good faith is not questioned (Petn. p. 34; R. 15, 16; Tr. 68).

## REASONS FOR DENYING THE WRIT

1. The decision of the Court below was correct. The Board's power is to adjudicate and remedy unfair labor practices; it has not been entrusted by Congress with the jurisdiction to compel compliance with contracts. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 42; see *Vaca v. Sipes*, 386 U.S. 171, 187 (1967); *Dowd Box Co. v. Courtney*, 368 U.S. 502, 509, 510-511 (1962); *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 443-444 n. 2 (1955). That jurisdiction rests only in the federal or state courts. 29 U.S.C. Sec. 185; Petn. p. 44; *Cheney California Lumber Co. v. National Labor Relations Board*, 319 F.2d 375, 378 (C.A. 9, 1963).

The unfair labor practice here found was in the employer's refusal, based on a good faith but erroneous conception of his rights, to execute the contract negotiated with the Union by the multi-employer bargaining unit and to bind himself to its terms. By ordering him to execute and honor the agreement, both the Board and the Court of Appeals have fully remedied that unfair

labor practice since by compliance, the employer will concededly be bound by all of the terms of the contract just as if he had signed it in the first instance. Indeed, since his withdrawal from the multiemployer bargaining agreement was subsequent to the effective date of the 1963-1967 contract, he was bound by its terms whether he signed it or not (G.C. Exh. 2, p. 9, quoted at Petn. p. 3, n. 4). If there is a dispute over whether petitioner has complied with the contract after execution, such rights as the Union or the employees have thereunder, whatever they may be, can be established in the only proper forum for their adjudication — the courts.

That portion of the Board's order which the Court of Appeals refused to enforce is simply an attempt to do indirectly what the Board has itself held it cannot do directly.[4] Under the guise of an exercise of its remedial powers, it is in effect specifically enforcing provisions of the contract in an administrative proceeding, purporting to confine the courts to a limited review thereof and subjecting the employer to possible contempt proceedings for a simple breach of contract. This not only goes far beyond the remedy necessary to correct the unfair labor practice, i.e., the placing of the parties in the *status quo ante* by submitting the employer to the binding effect of the contract; it is the exercise of a jurisdiction the Board does not possess. See *Sinclair Refining Co. v. N.L.R.B.*,

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[4] "The Board is not the proper forum for parties seeking to remedy alleged breach of contract or to obtain specific enforcement of its terms." *Re United Telephone Co. of the West*, 112 N.L.R.B. 779, 782 (1955). And see *Re Hyde*, 145 N.L.R.B. 1252, enforced sub nom. *National Labor Relations Board v. Hyde*, 339 F.2d 568 (C.A. 9, 1964).

306 F.2d 569, 575, 576-77 (C.A. 5 1962); *United Steelworkers v. American International Aluminum Corp.*, 334 F.2d 147, 152 (C.A. 5 1964). The Court of Appeals properly refused to enforce that portion of the Board's order requiring payment of fringe benefits.[5]

2. In the present circumstances of this case it would be most proper for this Court to exercise its discretion to deny the writ. It has already denied certiorari in this case to the employer on an issue of at least equal importance to that here posed by the Board — the proper interpretation of the time limits provisions contained in Section 10(b) of the Act (20 U.S.C. § 160(b)).[6] As already pointed out, when the employer complies with the decree heretofore entered by the Court of Appeals, as he will, the Union will have all of the rights and remedies under the contract it would have if the unfair labor practice had not been committed. It seems harsh in such a situation to subject this small enterpreneur, whose only fault was ignorance resulting in an honest mistake as to his

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[5] Our argument is in no way inconsistent with judicial statements that the Board has jurisdiction to find an unfair labor practice even though the act charged is also a breach of contract remediable by the courts, e.g. *Smith v. Evening News Assn.*, 371 U.S. 195, 197 (1962). Nor is it in any way inconsistent with the decision of this Court in *National Labor Relations Board v. C & C Plywood Corp.*, 385 U.S. 421 (1967). We do not contend that the Board does not have full and exclusive power to determine whether an act is an unfair labor practice and in its exercise thereof to determine, as held in *Plywood*, whether contractual terms interpose a valid defense to such a charge. But here the terms of the contract have nothing to do with the unfair labor practice charged and found, i.e., the refusal to sign the contract regardless of its terms.

[6] Case No. 190 this term, 390 U.S. (Prelim.) 920; Petn. p. 2, n. 1.

rights and duties, to the additional heavy burden of expense he cannot afford for the sole purpose of giving the Board an opportunity to attempt to vindicate an abstract principle.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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May, 1968.